

We decree the appeal, restore the decree of the Subordinate Judge and dismiss the plaintiff's suit with costs of all the courts.

*Before Sir Grimwood Mears, Knight, Chief Justice, and  
Mr. Justice Lindsay.*

1923  
March, 2.

SHEO DARSHAN SINGH (OPPOSITE PARTY) *v.* BENI  
CHAUDHRI AND OTHERS (APPLICANTS).\*

*Mortgage—Suit for redemption—Costs awarded by appellate  
court—Failure to deposit in time—Charge on mortgaged  
property.*

Where in a suit for redemption of a mortgage the appellate court increases the amount of the costs payable by the plaintiff, such costs, in the absence of any direction to the contrary, form part of the money chargeable on the mortgaged property, and if they are not paid within the time limited the plaintiff is not entitled to possession. *Aminu Bibi v. Ram Shankar Misra* (1), followed.

THE facts of this case were as follows :—

Babu Sheo Darshan Singh brought a suit for redemption of a mortgage and obtained on the 22nd of April, 1919, a preliminary decree. The court found that the plaintiff had to pay for redemption a sum of Rs. 1,747-8-6 for principal and interest and Rs. 69-2-0 for costs, making a total of Rs. 1,816-10-6.

The item for costs just referred to included only two-thirds of the costs incurred by the defendants mortgagees.

This sum was deposited by the plaintiff mortgagor in court and on the 26th of June, 1919, a final decree under order XXXIV, rule 8, was passed. On the 15th of July, 1919, the plaintiff was put in possession of the mortgaged property.

Meanwhile the mortgagees appealed against the preliminary decree and on the 2nd of December, 1920,

\* Appeal No. 31 of 1925, under section 10 of the Letters Patent.

(1) (1919) I.L.R., 41 All., 473.

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the appellate court varied the preliminary decree by directing the payment of a larger sum and also by giving direction for payment of certain costs. The time for payment was extended by the appellate decree to the 2nd of March, 1921. Before this latter date the plaintiff did deposit in court an extra sum of Rs. 175, making a total of Rs. 1,991-10-6. There was, however, due from him under the appellate decree a further sum of Rs. 45-6-0 in respect of costs, and this sum he did not pay before the date in question.

On the 18th of June, 1921, the mortgagees applied to the court and asked to be restored to possession of the mortgaged property, on the grounds that the decree of the appellate court had modified the decree of the court of first instance and that the full sum payable by the plaintiff mortgagor had not been deposited in court. The mortgagee also asked for mesne profits for the period covered by the plaintiff's possession. The defendants got an order for re-delivery of possession and also got an order entitling them to Rs. 800 as mesne profits for two years. The plaintiff then appealed on the ground that he had in effect complied with the terms of the appellate decree and was not liable to re-deliver possession to the mortgagees. In other words, his plea was that the payment of the above mentioned sum of Rs. 45-6-0 was not a condition precedent to his obtaining redemption and his being entitled to retain possession of the mortgaged property.

The plaintiff's appeal was dismissed and he filed a second appeal to the High Court, and it came before a Bench, the Judges composing which differed in opinion: MUKERJI, J., held on a construction of the decree that the costs awarded by the lower appellate court were not chargeable on the mortgaged property, whilst DANIELS, J., held that they were, on the

strength of the ruling in *Dambar Singh v. Kalyan Singh* (1) and *Amina Bibi v. Rama Shankar Misra* (2).

The appeal was therefore dismissed.

The plaintiff appealed under section 10 of the Letters Patent from the judgement of DANIELS, J.

Munshi *Shiva Prasad Sinha* (for Munshi *Hari-bans Sahai*), for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondent.

The judgement of the Court (MEARS C. J., and LINDSAY, J.) after stating the facts as above thus continued :—

The question arose, therefore, whether this sum of Rs. 45-6-0, costs awarded in appeal, was a charge on the mortgaged property. Was this sum added to the mortgage money? The two learned Judges of this Court have differed in their opinion regarding this matter. It appears to us, however, that the view taken by Mr. Justice DANIELS is the correct view and that as a matter of law this sum of Rs. 45-6-0 was a charge on the mortgaged property. It is true that in the decree of the appellate court there was some confusion regarding the order for costs. The appellate court was of opinion that the defendants mortgagees were entitled to their full costs in the court of first instance, that is to say, to a sum over Rs. 100 and it made an order accordingly. It laid down that the plaintiff mortgagor was liable to pay Rs. 1,991-10-6 by the 2nd of March, 1921, and then went on to give further directions regarding costs. Both sides admit that as framed the additional order regarding costs was erroneous in respect of the amount specified, but there is no dispute whatever that a sum of Rs. 45-6-0 was payable by the mortgagor under the appellate court's decree. The

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(1) (1917) I.L.R., 40 All., 109.

(2) (1919) I.L.R., 41 All., 473.

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question, whether costs awarded in the manner just referred to were a charge on the mortgaged property, is one regarding which the law is well settled and in this connexion we may refer to the statement of the law laid down in Ghose's Law of Mortgage in India, 4th edition, volume I, page 619. Speaking of redemption the learned author says: "But the costs of the action will, as a rule, be only added to the amount of the security; and the mortgagor will be made personally liable for them only in very exceptional cases of misconduct". The learned author goes on to say that it is certainly competent to the court in the exercise of its discretion to award the costs personally against the mortgagor, but where the terms of the decree are ambiguous it ought not to be construed in such a manner as to enable the mortgagee to realize his costs personally from the mortgagor. The law has been laid down in the same sense in a case in this Court, *Amina Bibi v. Ram Shankar Misra* (1). We think, therefore, that the interpretation put upon this decree by Mr. Justice DANIELS was a correct one and in accordance with the law as explained above. It follows, therefore, that the mortgagor, having failed to make a deposit in court of the full sum charged upon the property, was not entitled to retain possession as against the mortgagees after the decree had been passed in appeal. We approve of the view taken by Mr. Justice DANIELS and dismiss this appeal with costs.

*Appeal dismissed.*

(1) (1919) I.L.R., 41 All., 479.